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No. 82-287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

In re Cement and Concrete Antitrust Litigation
(MDL Docket No. 296)

STATE OF ARIZONA, et al.,

Petitioners,

—vs.—

ASH GROVE CEMENT COMPANY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID BONDERMAN
Counsel of Record
S. MARK TULLER
JACQUELINE R. DENNING

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 872-6700

On Behalf of All Respondents

September, 1982

Questions Presented

1. Where an application for extension of time within which to file a petition for writ of certiorari is denied and the jurisdictional 90-day period for seeking certiorari expires, is the time for seeking certiorari extended by the filing in the Court of Appeals of an *untimely* petition for rehearing?

2. Did the Court of Appeals commit reversible error in (a) dismissing for lack of finality an appeal pursuant to 28 U.S.C. § 1291 and (b) declining to accept a discretionary appeal pursuant to 28 U.S.C. § 1292(b) of the decision of a district court judge to recuse himself from further participation in pretrial proceedings in this multidistrict case?

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ON WRIT OF CERTIORARI TO THE UNITED STATES
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

For the reasons set forth herein, respondents[1] respectfully oppose the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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1 Respondents are Ash Grove Cement Co.; Citadel Cement Corp.; Columbia Cement Division of Filtrol Corporation; The Flintkote Company; Giant Portland Cement Co.; Kaiser Cement & Gypsum Corporation; Keystone Portland Cement Co.; Lehigh Portland Cement Co.; Lone Star

PERTINENT STATUTES AND REGULATIONS

In addition to the statutes set forth in the Petition, 28 U.S.C. § 2101(c), and Supreme Court Rules 18, 20.2, 20.3, and 20.4 are pertinent and are printed in Appendix II hereto.

COUNTERSTATEMENT OF THE CASE

The undisputed record in *In re Cement and Concrete Antitrust Litigation*, MDL Dkt. No. 296, shows that Judge Muecke's wife owns stock in members of the plaintiff National Cement Class. Based upon this fact, and after obtaining an opinion from the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States concluding that recusal was appropriate, Judge Muecke recused himself from further participation in this multidistrict case which has been consolidated for pretrial proceedings in the District of Arizona. *In re Cement and Concrete Antitrust Litigation*, 515 F. Supp. 1076 (D. Ariz. 1981). Judge Muecke recused himself because "the law [28 U.S.C. § 455], as written, says I must," *id.* at 1078, and because "this Court is very persuaded by the Advisory Committee's conclusions as to Canon 3C [of the Code of Judicial Conduct]," *id.* at 1079.

Subsequent to rendering his recusal order and opinion, Judge Muecke, at petitioners' request, certified his recusal to the Ninth Circuit pursuant to 28 U.S.C. § 1292(b). Petition Appendix C. Petitioners thereupon sought review in the Ninth Circuit of Judge Muecke's recusal decision in three ways: they

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Industries, Inc.; The Marquette Company; The Monarch Cement Co.; Medusa Corporation; Missouri Portland Cement Co.; Monolith Portland Cement Co.; National Gypsum Co.; OKC Corporation; Oregon Portland Cement Company; Portland Cement Co. of Utah; Universal Atlas Cement Division of United States Steel Corporation; and Whitehall Cement Company. In addition to the foregoing respondents, and the additional interested parties whose names are contained on the Master Class List for the classes certified in MDL 296, which has been filed with this Court, the companies listed in Appendix I have an interest in the outcome of this case.

filed a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) (Ninth Circuit Dkt. No. 81-8079), they filed an appeal pursuant to 28 U.S.C. § 1291 (Ninth Circuit Dkt. No. 81-5481), and they filed a petition for writ of mandamus (Ninth Circuit Dkt. No. 81-7465).

On October 30, 1981, the Court of Appeals entered an order denying permission to appeal pursuant to 28 U.S.C. § 1292(b), dismissing petitioners' 28 U.S.C. § 1291 appeal, and setting the petition for writ of mandamus down for oral argument. Petition Appendix D. The mandamus proceeding was argued to the Ninth Circuit on January 4, 1982 and the matter remains under submission.

The 90-day period within which a petition for writ of certiorari must be filed to review the Court of Appeals' October 30, 1981 order expired on January 28, 1982. 28 U.S.C. § 2101(c). On January 22, 1982, petitioners made application to this Court for an enlargement of time in which to file the Petition, which was denied by Justice Rehnquist on January 25, 1982. Docket A-656, Appendix III hereto.[2] Notwithstanding Justice Rehnquist's denial of an enlargement of time within which to file the Petition, petitioners did not file a petition for certiorari before the 90 days expired on January 28, 1982.

Instead, on January 11, 1982, petitioners requested the Ninth Circuit to permit the filing of an *untimely* petition for reconsideration of that court's October 30, 1981 Order, since the time for filing such a petition had expired on November 13, 1981. The Court of Appeals on January 26, 1982, granted leave to file a petition for reconsideration "out of time," and explained that on January 27, 1982, the court would file an "opinion expanding the views summarily expressed in the order filed October 30, 1981." Petition Appendix F. The expanded

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2 After their application for extension was denied by Justice Rehnquist, petitioners on January 26, 1982 filed a petition for reconsideration, which violated Supreme Court Rule 29.3, providing that any application for extension of time to petition for certiorari "if once denied, may not be renewed." The clerk returned the document pursuant to Rule 43.5.

opinion reiterated the conclusions set forth in the Court of Appeals' October 30, 1981 order without modifying the court's position on any issue.[3]

Pursuant to the Court of Appeals' January 26, 1982 order granting petitioners leave to file for rehearing out of time, petitioners on February 3, 1982 filed their petition for rehearing and suggestion for rehearing en banc. The Court of Appeals denied the petition for rehearing on April 15, 1982, and rejected the suggestion for rehearing en banc, no judge of the Circuit having requested a vote on this suggestion.[4]

Then, on June 2, 1982, petitioners filed in this Court a third application for enlargement of time within which to file their petition for writ of certiorari. Motion to Extend Time to File Petition for Certiorari, Dkt. A-1052, dated June 2, 1982. Without mentioning that Justice Rehnquist previously had denied applications for time extensions and that the jurisdictional time for seeking certiorari from the Ninth Circuit's October 30, 1981 Order had therefore expired on January 28, 1982, petitioners incorrectly represented in this application that the 90-day period within which to file their petition for writ of certiorari was due to expire July 14, 1982. *Id.* at 2. Apparently relying on petitioners' misstatements, and before respondents were able to bring the misstatements to the Court's attention, Justice Rehnquist granted petitioners an extension to August 15, 1982.[5]

On August 16, 1982, petitioners filed the present Petition.

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3 Petition Appendix A. The Ninth Circuit's opinion also appears at 673 F.2d 1020 (9th Cir. 1982).

4 Petition Appendix G. The court's April 15, 1982 Denial of Rehearing also amended its previous opinion by adding an explanatory footnote, which did not modify its position on any issue.

5 Subsequently, by motion dated July 23, 1982, petitioners filed a fourth application for further extension of time. After respondents filed an opposition, petitioners' motion was denied without comment by Justice Rehnquist on August 2, 1982.

REASONS FOR DENYING THE WRIT

I. The Court Has No Jurisdiction To Consider The Petition Because It Was Not Timely Filed.

This Court is without jurisdiction to consider the present Petition for Writ of Certiorari to review the Order of the United States Court of Appeals for the Ninth Circuit entered on October 30, 1981, because the Petition was not filed within the 90-day time period provided for filing such a petition. 28 U.S.C. § 2101(c)[6] In their first application for time extension to Justice Rehnquist, petitioners conceded that their Petition for Writ of Certiorari from the Court of Appeals Order "must be filed" no later than January 29, 1982 (thus giving themselves an extra day). Motion to Extend Time to File Petition for Certiorari, Dkt. A-656, dated January 22, 1982, at 6. This Petition was not filed until August 16, 1982, 200 days out of time.

Petitioners apparently take the position that, although the 90-day time period for seeking certiorari expired after Justice Rehnquist declined to grant a time extension, they nonetheless extended the 90 days by filing in the Court of Appeals an *untimely* petition for reconsideration. Petitioners are clearly wrong. In 1980 Rule 20.4 of the Rules of this Court was amended expressly to provide that the time for seeking certiorari runs from the denial of a rehearing only "if a petition for rehearing is *timely* filed by any party in the case." (Emphasis added.)[7]

6 *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952); *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 417-18 (1923); Supreme Court Rule 20.2. Rule 20.3 of the Rules of the Supreme Court provides that "The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time."

7 *See* 13 Moore's Federal Practice ¶¶ 820.01, 820.04 (1982). This amendment to the Court's rules resolved the apparent uncertainty created by language in older cases dealing with appeals in general as to whether action by a lower court on an untimely petition for rehearing would extend the time for seeking appeal. *E.g.*, compare R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) § 6.3 (quoting *Bowman* v. *Loperena*, 311 U.S. 262 (1940)) with § 6.4 (quoting *Federal Power Commission* v. *Idaho Power Co.* 344 U.S. 17 (1952) and *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952)).

And, of course, this result is not changed simply because the Ninth Circuit on January 27, 1982 issued an opinion reiterating at greater length the views summarily expressed in the October 30, 1981 Order.[8] This case falls squarely within the rule articulated in *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952).

> "Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." (Footnotes omitted.)

Just as this Court concluded in *Minneapolis-Honeywell*: "The judgment of [January 27, 1982] which petitioner now seeks to have us review, does not meet this test. It reiterated, without change, everything which had been decided on [October 30, 1981]." *Id.* at 212.

Thus, because the time for filing a petition for a writ of certiorari has expired, thereby depriving this Court of jurisdiction, the Petition should be denied or, pursuant to Supreme Court Rule 20.3, returned to petitioners by the clerk.

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8 As petitioners conceded in their third application for time extension, the Court of Appeals itself had characterized the opinion as simply "expanding the views summarily expressed in the Order filed October 30, 1981." Motion to Extend Time to File Petition for Certiorari, Dkt. A-1052, dated June 2, 1982, at 4. The Court of Appeals' expanded opinion in fact reiterated its earlier conclusions without modifying its position on any issue. Compare Petition, Appendices A and D.

II. The Ninth Circuit's Denial Of The § 1292(b) Appeal And Its Dismissal Of The § 1291 Appeal Was Clearly Proper.

The only issues legitimately presented by the Petition are whether the Ninth Circuit committed reversible error in declining to accept a discretionary appeal pursuant to 28 U.S.C. § 1292(b) and in dismissing for lack of finality an appeal pursuant to 28 U.S.C. § 1291 of Judge Muecke's recusal order. The Court of Appeals was clearly correct in both instances and its decision does not present an issue that should be reviewed by this Court.

Although mandamus review of Judge Muecke's recusal decision is currently underway before the Ninth Circuit, petitioners claim that this Court must, as a threshold matter, decide the merits of the recusal order before it can even consider whether to grant or deny certiorari on the procedural issues raised by the present Petition. As discussed below, the recusal issue petitioners seek to raise was not decided by the Court of Appeals. There is no merit to petitioners' position that they can force premature consideration of that issue in this Court by filing a Petition on procedural issues not appropriate for review and then claiming that this Court cannot even deny certiorari without deciding as a threshold matter the recusal issue the Ninth Circuit currently has under advisement.

A. Refusal To Entertain the § 1292(b) Appeal Was Proper.

The decision of a Court of Appeals not to permit an appeal under 28 U.S.C. § 1292(b) is ultimately discretionary. The statute authorizing such appeals provides only that a Court of Appeals may "in its discretion, permit an appeal to be taken." Thus, the decision of a Court of Appeals in this regard is not ordinarily reviewable.[9]

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9 *See* 17 C. Wright, A. Miller & E. Cooper *Federal Practice and Procedure*, § 4036 at 43 n.18 (1978) ("[T]he discretion to deny interlocutory appeal under 28 U.S.C.A. § 1292(b) . . . is so broad that Supreme Court reversal should never be available . . . .").

Moreover, the Court of Appeals properly decided not to entertain an interlocutory appeal of Judge Muecke's decision to recuse himself since, in the circumstances of this case, that ruling did not present a controlling question of law within the meaning of § 1292(b). As both the Ninth[10] and Seventh[11] Circuits have held, no party to litigation necessarily has a protectable interest in the continued exercise of jurisdiction by a particular judge, so Judge Muecke's opinion did not involve any legal issue of controlling importance under the circumstances of this case.[12]

Contrary to petitioners suggestion, the Court of Appeals' refusal to entertain an interlocutory appeal of Judge Muecke's recusal order does not create a conflict among the Circuits. The Ninth Circuit did not foreclose permissive review under Section 1292(b) of matters collateral to the merits (such as the court quite properly found recusal to be) when exceptional circumstances warrant it. 673 F.2d at 1026-27 and n.5. (Petition Appendix A at A-9 through A-11; Petition Appendix G at A-46.) Likewise, in the cases petitioners claim "conflict" with the Ninth Circuit's instant refusal to permit interlocutory appeal, each of the courts made clear that some recusal opinions should receive discretionary appellate review, and others should not, depending on the circumstances of each case. Thus, although some courts have permitted discretionary interlocutory appeal of recusal decisions and others have not, the differing results are due not to a conflict of law, but to differing analyses of the particular facts and circumstances of each case.

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10 *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1024 (9th Cir. 1981). Petition Appendix A at A-6.

11 *Hampton* v. *City of Chicago*, 643 F.2d 478, 479 (7th Cir. 1981).

12 Furthermore, Judge Muecke's recusal was based in part on his interpretation of the *ethical* considerations of Canon 3C of the Code of Judicial Conduct, so that his decision to recuse himself would not be controlled by any contrary construction of 28 U.S.C. § 455.

The Court of Appeals' decision not to entertain interlocutory review in this case was perfectly proper, based on an analysis of the factual circumstances of the present case, and presents no issue which should be reviewed by this Court.

B. The Dismissal Of The Section 1291 Appeal Was Clearly Proper.

The Court of Appeals' dismissal of the Section 1291 appeal was also correct and not worthy of review.

Petitioners do not dispute the Ninth Circuit's conclusion that Judge Muecke's recusal order was not a final and appealable order for purposes of 28 U.S.C. § 1291. They also do not dispute the Ninth Circuit's conclusion that Judge Muecke's recusal decision was not appealable under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), because petitioners have no "claim of right" to any particular judge. Instead, petitioners claim that the collateral order doctrine applies in this case because Judge Muecke's decision precludes assignment of any judge. Petition at 12-13. That contention is preposterous. There are literally hundreds of federal judges to whom the case could be reassigned, including several judges in the District of Arizona where the case is now pending. Indeed the Ninth Circuit already has rejected petitioners' suggestion that the Judicial Panel is prevented from reassigning the case to one of these judges because members of the Panel would themselves be disqualified. As the Court of Appeals found, it is absolutely clear that the possible recusal of a judge from the adjudicative phases of a proceeding does not prohibit that judge from carrying out ministerial duties short of adjudication, including assigning a case to another judge, or assigning a judge to make the assignment. 673 F.2d at 1024-25. (Petition Appendix A at A-6 through A-7). *See Stringer* v. *United States*, 233 F.2d 947, 948 (9th Cir. 1956); *Application of Scott*, 379 F. Supp. 622, 624 (S.D. Tex. 1974). In fact, even after Judge Muecke recused himself, petitioners themselves successfully petitioned him to transfer the case temporarily to another judge in the District of Arizona to rule upon certain matters.

Petitioners also suggest that, despite the Ninth Circuit's clear holding that the Panel can reassign the case, the Judicial Panel deems itself incapable of appointing a new judge. Petition at 13. The Panel has said no such thing. Instead, at petitioners' suggestion, the Panel deferred its decision on appointing a new judge "until plaintiffs' [petitioners'] mandamus petition in the Ninth Circuit has been resolved." Petition Appendix H. Petitioners urged the Panel not to take action to assign a new judge before a decision by the Ninth Circuit, claiming that assigning a new judge would "disregard the courtesy usually afforded other Courts," "abuse traditional concepts of comity," and "possibly moo[t] the recusal issues in the Ninth Circuit."[13] Plaintiffs' Response to Defendants' Motion for Designation of District Court Judge, dated December 10, 1981, at 5. The Panel's brief order nowhere suggested that any other principles were involved in its decision to await the Ninth Circuit's ruling.

Thus, the Court of Appeals' dismissal of petitioners' § 1291 appeal of Judge Muecke's recusal order was clearly correct and presents no issue which should be reviewed by this Court.

III. Judge Muecke's Recusal Decision Is Not Presently Before This Court.

Although the Ninth Circuit currently has Judge Muecke's recusal decision under review,[14] petitioners ask this Court to review the merits of that decision in connection with the present Petition. Because the Court of Appeals has not yet decided that issue, however, that matter is not a question on which certiorari may be sought. *See, e.g., J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) (Supreme

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13 Respondents respectfully submit that petitioners have failed to heed their own advice by asking this Court to consider the recusal issue before the Ninth Circuit has decided the issue.

14 Although the Ninth Circuit declined to entertain an interlocutory appeal and dismissed petitioners' § 1291 appeal, petitioners' mandamus petition has been briefed, argued and submitted to the Court of Appeals, where it is under advisement.

Court will "not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed"); *Bakery Sales Drivers Local No. 33* v. *Wagshal*, 333 U.S. 437, 444-45 (1948).[15] Furthermore, because review of Judge Muecke's recusal decision is presently pending before the Ninth Circuit, the strong policies favoring orderly development of appellate issues counsel against this Court's reviewing the recusal issue in the absence of a considered opinion by the Court of Appeals and full briefs of the parties.[16]

In their attempt to make the merits of Judge Muecke's recusal decision part of the present Petition, petitioners claim that this Court has no choice but to rule on the recusal issue. They claim that before the Court can pass on the Petition, or even make ministerial decisions regarding the form of the briefs presented to the Court,[17] it must decide whether Judge Muecke correctly decided the recusal issue.[18]

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15 Likewise, the general rule is that questions not raised before the Court of Appeals may not be raised for the first time on Supreme Court review. *See, e.g., United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 181-82 (1976); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). This Court always has been reluctant to decide issues not decided by the lower courts, because of the advantage of prior appellate deliberation. *See Wood* v. *Strickland*, 420 U.S. 308, 326-27 (1975).

16 "Issues that are left to mature in courts of appeals may be resolved without any need for Supreme Court intervention and may be resolved better by the Supreme Court if it needs to act." 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4034 at 4-5 (1978). In any event, petitioners have not satisfied Supreme Court Rule 18, which requires a showing of "imperative public importance" before this Court will deviate "from the normal appellate practice" and review a case pending in a Court of Appeals.

17 Petitioners go so far as to contend that this Court cannot "even decide the simple procedural motion for relief from the Rules" without deciding the merits of Judge Muecke's recusal. Petition at 8; Petitioners' Reply Memorandum in Support of "Motion for Relief from Compliance with Certain Provisions of Supreme Court Rules 19.3, 21.1(b), 28.1 and 28.3," dated September 8, 1982, at 2.

18 Petitioners claim that the Court must now consider the underlying merits of the recusal issue because the 1982 Financial Disclosure Reports of

The Court need not accept such sophism. It can dispose of the present Petition, which is jurisdictionally out of time and which presents issues that are obviously not worthy of issuance of a writ of certiorari, without disturbing the orderly appellate consideration of the recusal issue. The present Petition is simply part of the larger recusal dispute which is still being developed in the Court of Appeals below, and which may arrive in this Court in due time. It is therefore entirely appropriate for this Court to deny the present Petition in order to assure that the recusal dispute reaches this Court in a posture for deliberate consideration.

Any court has authority to assure that the matter of its own capacity is considered in an orderly and thorough way, and to enter appropriate orders to that effect. Thus a judge who (ultimately) is without jurisdiction nonetheless has authority to order discovery on the issue, and to enter other appropriate orders necessary to put the issue of his jurisdiction into a posture for reasoned decision. *See Oppenheimer Fund* v. *Sanders*, 437 U.S. 340, 351 n.13 (1978); *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2009 at 52 (1970). Likewise, a court has the obligation to assure that the matter of its own potential recusal ripens in an orderly and deliberate way.[19] It is well settled that a court has plenary authority to control its own docket. *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1978). In the absence of a Court

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five Justices purportedly indicate stock ownership in class members ignores the fact that those statements are current only as of December 31, 1981. It does not follow that any Justice currently has such a shareholding or will at the time the recusal issue is properly presented, whether later in connection with a timely petition for review of the Court of Appeals' mandamus ruling or, should the Court decide to defer action on this Petition, in connection with its later consideration.

19 For example, Judge Muecke ordered a briefing schedule on the recusal issue after a suggestion of recusal had been made, and it would have been ludicrous to suggest he had no authority to do so on the ground that he was recused.

of Appeals' decision, which is likely to be forthcoming in the companion mandamus proceeding, it is inappropriate for this Court to review the recusal matter as preliminary to considering the certiorari petition which itself raises no review worthy issues.

In urging this Court to short circuit the orderly appellate process and consider the recusal issue before the Court of Appeals has decided the issue, petitioners paint a totally false picture of the drastic nature of Judge Muecke's ruling. In recusing himself, Judge Muecke simply followed the clear language of the statute enacted by Congress[20] and the advice he solicited from the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States regarding the ethical obligations imposed by Canon 3C of the Code of Judicial Conduct. Petition Appendix B at A-29 through A-33. Moreover, Judge Muecke's conclusion that the recusal statute applies to interests in both named class representatives and unnamed class members is consistent with this Court's conclusion in *United States* v. *Will*, 449 U.S. 200 (1980), that (absent the Rule of Necessity) every Article III judge was disqualified under section 455(b)(5)(i) because as unnamed members of the

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20 Following intensive judicial confirmation controversies stemming in part from the vague recusal standard of the then existing statute, Congress in 1974 amended 28 U.S.C. § 455 to resolve "the dilemmas created by the loose language of Section 455" and remove "the cloud of doubt" to which judges were subjected in applying the statute. *1974 Amendments to 28 U.S.C. § 455: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Committee*, 93d Cong., 1st Sess. 24 (statement of Senator Hollings). As amended in 1974, 28 U.S.C. § 455 contains a clear per se standard that requires a judge to recuse himself whenever he has a financial interest, "however small," in a party to or the subject matter of a proceeding. It is established that stock ownership of even a single share is sufficient financial interest to require recusal. *In re New Mexico National Gas Antitrust Litigation*, 620 F.2d 794, 796 (10th Cir. 1980); *In re Virginia Electric & Power Co.*, 539 F.2d 357, 368 (4th Cir. 1976); *see also* H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 7 (1974).

class each was "a party to the proceeding."[21] *Id.* at 211-12 and n.11. In fact, to our knowledge the only other district judge to have been confronted with this issue also held recently that class members are "parties" to the proceeding for purposes of the recusal statute, 28 U.S.C. § 455. *In re New Mexico Natural Gas Antitrust Litigation,* MDL Dkt. No. 403 (D.N.M. May 14, 1982) (See Transcript of Proceedings, attached hereto as Appendix IV at 7a-8a.) The drastic consequences and inflated claims petitioners attempt to portray are simply illusory. At most Judge Muecke's recusal poses an interesting, if uncommon, issue. Issues are not appropriate for review by this Court, however, simply because they are interesting, particularly when the issue is presently pending before the Court of Appeals.[22]

Therefore, there is no need for the Court to prematurely consider an issue presently pending in the Court of Appeals.

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21 This Court's conclusion in this regard was precisely the result advocated by the United States in its brief to the Court. *See* Brief of Solicitor General at 25.

22 If, however, this Court is of the view that it cannot dispose of the Petition without resolving the recusal issue, the Court can defer any action on the Petition until after the Court of Appeals renders its decision. In the event the Court believes that the merits of the recusal issue should be considered at this time, respondents agree with petitioners that the Court should direct the parties to fully brief the issue to the Court. See Petitioners' Reply Memorandum in Support of "Motion for Relief from Compliance with Certain Provisions of Supreme Court Rules 19.3, 21.1(b), 28.1 and 28.3," dated September 8, 1982, at 3.

CONCLUSION

This Petition was filed long out of time. The issues otherwise legitimately presented by this Petition—the correctness of the Court of Appeals' disposition of the § 1292(b) and § 1291 appeals—are not issues worthy of review by this Court. The threshold issue petitioners seek to raise– the correctness of the district court judge's recusal decision—is not properly before the Court and need not be resolved to pass on the present Petition. Respondents therefore respectfully submit that the Petition for Writ of Certiorari should be denied or, pursuant to Supreme Court Rule 20.3, returned to petitioners by the clerk.

Respectfully submitted,

DAVID BONDERMAN
Counsel of Record
S. MARK TULLER
JACQUELINE R. DENNING

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

On Behalf of All Respondents

September, 1982

APPENDIX I

In addition to the respondents listed in footnote 1 of this document, and the additional interested parties whose names are contained on the Master Class List for the classes certified in MDL 296, which has been filed with this Court, the following companies have an interest in the outcome of this case.

Alpha Portland Industries, Inc.
Arkansas Cement Corp.
Arkansas-Louisiana Gas Co.
Ashland Oil, Inc.
Canada Cement La Farge
Capital Aggregates, Inc.
Centex Corp.
Coplay Cement Mfg. Co.
Crane Corp.
Cyprus Hawaiian Cement Corp.
Dundee Cement Corp.
F. Ili Buzzi S.p.A. Cementi
General Portland, Inc.
Genstar, Ltd.
H. B. Zachry Company
H. K. Porter Co.
Heidelberg Zement A.G.
Holderbank Financere Glaris, Ltd.
Ideal Basic Industries, Inc.
Louisville Cement Co.
Martin Marietta Corp.
National Cement Co., Inc.
Nevada Cement Co.
Portland Cement Association
San Antonio Portland Co.
Santee Portland Cement Corp.
Societe des Cements Francais
Societe de Anonymes des Cements Vicat

Standard Oil Company (Indiana)
Valley Cement Industries Inc.
Vigier Cement Ltd.
Wyandotte Cement, Inc.

APPENDIX II

28 U.S.C. § 2101(c)

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Supreme Court Rules

18 A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court. See 28 U.S.C. § 2101(e); see also, *United States* v. *Bankers Trust Co.*, 294 U.S. 240 (1935); *Railroad Retiremen: Board* v. *Alton R. Co.*, 295 U.S. 330 (1935); *Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110 (1936); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *Ex parte Quirin*, 317 U.S. 1 (1942); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *Wilson* v. *Girard*, 354 U.S. 524 (1957); *United States* v. *Nixon*, 418 U.S. 683 (1974).

20.2 A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the Clerk within the time prescribed by law. See 28 U.S.C. § 2101(c).

20.3 The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

20.4 The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition

for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

APPENDIX III

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

January 27, 1982

Josef D. Cooper, Esq.
Suite 600
300 Montgomery Street
San Francisco, California 94104

RE: Arizona, et al. v. Ideal Basic Industries, Inc.; Arizona, et al. v. Ash Grove Cement Company, et. al.
A-656

Dear Mr. Cooper:

Your application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Rehnquist, who has endorsed thereon the following:

"1/25/82
Denied.
WHR"

Pursuant to Rule 43.5, your "motion for reconsideration . . . ," received on January 26, 1982, is herewith returned.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By

Katherine Downs
Assistant Clerk

rwk
cc: counsel of record

APPENDIX IV

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE: NEW MEXICO NATURAL GAS ANTITRUST LITIGATION — MDL DOCKET NO. 403

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that on the 14th day of May, 1982, at 12:02 o'clock p.m., this matter came on for hearing before THE HONORABLE HOWARD BRATTON, Chief United States District Judge, sitting at Albuquerque, New Mexico.

. . . [List of Appearances of counsel omitted]

LAW CLERK MASON-PLUNKETT: Please rise. Court is in session.

THE COURT: Please be seated. All right. Comes first a housekeeping matter. I filed today an Amended Memorandum of Opinion and Order for the Motions for Summary Judgment. All it does is incorporate the errata which we filed some time in February, I've forgotten when, and make corrections as to typographical and some cites and what not. We were rather pushed to get it out before the trial and so we've tried to clean it up. If there is any change in substance between it and the original Opinion and the errata, the originals control. But no change in substance is intended in any way and I think you will so find.

Addressing the pending Motion to Recuse, I had thought, originally, after the lawsuit was over, my general thinking was to package up your lawsuit on the issue of liability and send it on up to the Circuit Court while you handle your discovery matters on the issues of damages. That seemed to me to be the most expeditious and really orderly way to handle the matter.

But the decision will have to be made by another judge, because I conclude that the Motion to Recuse, on the ground

that I have relatives within the third degree of consanguinity, who are members of the class, who should be considered members of the class, for purposes of the recusal statute, is well taken even if it is very, very belated, to say the least.

Once the matter is raised, however, the timeliness is no issue because the fact remains that the statute is mandatory and by its own terms, it cannot be waived.

While I agree with the Judge who observed that the class action statute and the disqualification statute really do not mesh well in light of how class actions develop today, but nonetheless, that, the statute, remains and, in my judgment, is clear and determinative.

I regret that I did not note this matter at an earlier time of my own Motion, particularly since, if you will recall, I was the one who first raised the issue of recusal of a Judge when the matter was first assigned to me. You'd been presenting it to Judges, the matter, seeking ruling from other Judges and, apparently, never raised or considered the issue. But had I done so and raised this matter, it certainly would have saved my staff and me months and mountains of paper and 60 very long days. But that is neither here nor there now. That's water under the dam, under the bridge. But at the time I originally raised the issue and recused myself, I did not consider this point now raised: that relatives should be considered memb— or, members of the class should be considered parties within the meaning of the statute. And when the Circuit said that I should go ahead with the lawsuit, I simply put the whole thought of recusal out of my mind and went ahead and handled it. But now that the issue has been raised, the only proper course and the one I'm going to pursue is to recuse myself from further participation in the case.

I have consulted the other Judges of the court here and each advises me that he feels the same disability and would not serve in that cause. But I just tell you that they have advised me that. If you want to go and talk to each Judge and make your own determination or have them advise you directly, why, of course, you are free to do so. If I do not hear from you—I'll give you an opportunity to do that, if you want to. If I do not hear

from you by Tuesday, I will notify Judge Seth of the situation and he will handle the matter further.

One last thing, I think all of you had inquired of me whether you might interview the jurors who had served in the case and discuss the case with them. I would suggest you take that matter up with whoever is designated in the matter and that you do not consult or visit with the jurors prior to taking the matter up with whoever handles the matter henceforth.

There being nothing further, Court will be in recess.

MR. BEANE: Your Honor, pardon me, there is one item that's come to my attention and I simply want to bring it to the Court's attention and it's come to my attention that Judge Seth, himself, may have been a customer of Southern Union during the class period and may not have opted out and I simply wanted the Court to know that I found that out at 9:00 o'clock this morning, Dallas time. What impact that has on anything, I certainly do not know. But I wanted that brought to the attention of the Court as soon as I found out about it.

THE COURT: All right. Okay. I mentioned some time, originally, that I assumed Judge Seth would be a member of the class, as I would, but that's a matter you can address with Judge Seth, of course. My proper course is to advise him and he'll handle the matter further from there.

Court's in recess.

(WHEREUPON, at 12:15 o'clock p.m., Court stood in recess.)

* * *

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

IN RE: NEW MEXICO NATURAL GAS ANTITRUST LITIGATION — MDL DOCKET NO. 403

The Hecht Company, *et al.* — CIV NO. 78-958

Sheila Brewer, *et al.* — CIV NO. 79-578

State of New Mexico, *ex rel.* Department of Finance and Administration, *et al.* — CIV NO. 79-733

Public Service Company of New Mexico — CIV NO. 81-479

—v.—

Southern Union Company, *et al.*

and

The Hecht Company, *et al.*

—v.— — CIV NO. 79-927

John T. MacGuire, *et al.*

ORDER

I recuse myself from further proceedings in the above causes.

/s/ Howard Bratton
Chief Judge